Residential
Tenancy
Commission

Residential Tenancy
Commission

Summaries of Significant Decisions

1983 4 R.T.C.

85-4614/

RESIDENTIAL TENANCY COMMISSION

SUMMARIES OF SIGNIFICANT DECISIONS - VOLUME 4

CITED (1983), 4 R.T.C.

This volume contains summaries of significant decisions and reasons given. If reference to the original full order and reasons is desired, contact the Head Office of the Residential Tenancy Commission at 77 Bloor Street West, Toronto, Ontario.

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This represents the fourth in a series of volumes of Summaries of Significant Decisions of the Commission. Cases selected for publication include decisions made by individual Commissioners at initial hearings, as well as decisions made by Appeal Panels of the Commission at appeal hearings. Cases summarized herein are based on decisions made to June 30, 1983.

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IN THE MATTER OF: 985 Maxwell Street
Sarnia, Ontario

AND IN THE MATTER OF an application for rent review by Bellray Developments Ltd. (Landlord)

COMMISSIONER: D. C. MacDonald

DATE OF DECISION: June 30, 1982

FILE NUMBER: 126-343-LN

ISSUES: Procedure - effect of sections 124 and 125.

This was an application under section 126 of the Residential Tenancies Act.

The tenants received notices at least 90 days prior to January 1, 1982 for increases in excess of the statutory limit of 6%. An application was not filed with the Commission, and the tenants refused to pay the increase on January 1, 1982. Some tenants tendered rent with a 6% increase added since this is the increase allowed by the Act without making an application. The landlord then tendered refunds, issued new notices for May 1, 1982, and filed an application with the Commission. Some of the tenants refused the refund and continued to pay the lawful rent plus 6%. The application was accepted pending the hearing of this issue.

Commissioner MacDonald concluded that the provisions of Sections 124 and 125 of the Residential Tenancies Act would not allow the method used by the landlord to file for an increase above 6% to take effect before January 1, 1983. In his view, the fact that the increase due date had passed, and rent had been tendered precluded the landlord from retracting his original offer or notice.

The tender of lawful rent by the tenants established the rent increase date as January 1, 1982. They acted within their lawful rights to tender only the lawful rent. The application was dismissed accordingly.

IN THE MATTER OF:	28 Ashland Avenue Toronto, Ontario
BETWEEN:	Victor Pyle, Lois Secord and Ken Ballantyne (Tenants) - and - Wendy Bowditch and Jeremy Bowditch (Landlords)
COMMISSIONER:	D. B. Braund
DATE OF ORDER:	August 20, 1982
FILE NUMBER:	129-735-TO
ISSUES:	Procedure - $3,000 monetary limit Amending applications - considerations

The tenants' claim on an application under section 129 of the Residential Tenancies Act for a rebate of illegal rent paid exceeded the monetary limit of $3,000 set out in sub-section 84(3). The landlord questioned the jurisdiction of the Commission under the circumstances. Subsection 84(3) provides in part:

> (3) The Commission shall not make an order for the payment of money where the amount claimed by any party to the application is in excess of $3,000...

The tenant decided to waive any claim beyond the amount of $3,000 but asked that the application be amended to a claim for the full period of such tenancy rather than the period up to the date of the application. Commissioner Braund ruled that so long as the amount claimed was limited by such a waiver, the application was within the Commission's legislated competence delineated under sub-section 84(3). In so ruling, the Commissioner examined the Small Claims Court Act and found no specific authorization in that legislation for the well founded practice in that Court of waiving additional amounts to bring a case within the Court's monetary jurisdiction.

With respect to the requested amendment, the Commissioner referred to section 101(c) of the Act, which allows an amendment to an application where same would be "fair and justified". Commissioner Braund decided to allow the amendment, noting that to do otherwise might result in a duplicity of proceedings.

In the result, a rebate in the amount of $3,000 was ordered.

IN THE MATTER OF: 125 Fairmont Avenue
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Yen Holdings, landlord.

APPEAL PANEL: H. F. Snyder, R. S. Bentley and L. C. Wilton

DATE OF DECISION: June 15, 1983

FILE NUMBER: 126-834-OT

ISSUES: Cost Revenue Statement - inadequate actual data - 1 1/2 months data insufficient.

On the initial application for a review of rents under section 126 of the Residential Tenancies Act, the landlord provided only 1 1/2 months of actual data and estimated a further 1 1/2 months in Year 2 and a further 12 months in the Projected Year. Commissioner Sprague then looked retrospectively from May 1, 1982 to August 1, 1981 and created an estimated Year 2 and proceeded to make findings accordingly.

The tenants appealed on the basis that "The Commissioner considered irrelevant and improper evidence, for example, the Commissioner constructed a theoretical first year." In deciding whether Commissioner Sprague had acted correctly in the matter, the panel referred to the "Guide to the Cost Revenue Statement" issued by the Commission. The Guide states that in the transitional phase between applications for rent review under the prior Residential Premises Rent Review Act and whole building review under the Residential Tenancies Act, for the first application under the latter Act, Year 2 may include up to 5 months' projected data.

The panel stated that since the subject application did not concern this transitional phase, the minimum requirement of seven months actual data was even more appropriate. Consequently, it was the panel's opinion that the material filed by the landlord did not allow for proper findings as required under section 131 of the Act. Commissioner Sprague's Order was therefore set aside and the landlord's application dismissed.

IN THE MATTER OF:	6 Liszt Gate Unit No. 8 Willowdale, Ontario
BETWEEN:	Kenneth and Marilyn McMillan (Tenants) - and - Brahmsgate Investments Inc. (Landlord)
APPEAL PANEL:	J. H. Thomson, N. L. Myrhorod, G. I. Mandel
DATE OF DECISION:	May 16, 1983
FILE NUMBER:	129-402-NY
ISSUES:	Section 1(1)(k) - "rent" - whether promise to pay taxes to third party is "rent"

This was an appeal by Brahmsgate Investments Inc. (landlord) from the Order of Commissioner Pollock dated October 20, 1982. This matter came on before Commissioner Pollock by way of an application by the tenants under Section 129 of the Residential Tenancies Act for repayment of rents charged in excess of those permitted by the Act. The Commissioner concluded that the tenant had made an overpayment of $438.54. In accordance with the provisions of Section 129, the Commissioner ordered that the landlord should pay the excess of $438.54 to the tenant. He also declared the rent that might be lawfully charged effective July 1, 1982 to be $549.19, and specified that this sum included the liability of the tenant to pay property taxes as set out in the lease dated September 1, 1981.

The landlord appealed on the grounds that the Commissioner erred in holding that the payment of property taxes by the tenant is rent as defined by the Residential Tenancies Act. Counsel for the landlord asserted that by virtue of the Municipal Act, both the landlord (owner) and tenant have co-equal obligations to pay municipal taxes; and that such taxes are not rent as between the landlord and tenant.

The Panel found, as did the Commissioner, that the covenant or promise to pay taxes separately, which was included in the lease commencing September 1, 1981, was a "consideration given to the landlord for the right to occupy the rental unit" and was, therefore, "rent" as defined in section 1(1)(k) of the Residential Tenancies Act. The value of the consideration in this instance was the amount of the tax payments made. The rent charged to the previous tenant in this unit included a specific package of services of which the payment of municipal taxes by the landlord was one. The withdrawal of a service from that package without a compensating reduction in the amount charged constituted an increase in rent.

The Panel accordingly dismissed the appeal and affirmed the Order of Commissioner Pollock. The landlord has appealed the Panel's Decision to the Divisional Court of the Supreme Court of Ontario.

IN THE MATTER OF: 30 Central Parkway West
Unit 608
Mississauga, Ontario.

AND IN THE MATTER OF an application for rent review by Toronto Apartment Buildings Co. Ltd., landlord.

APPEAL PANEL: G. E. Isaac, W. D. Biggar and M. S. Green

DATE OF ORDER: May 24, 1983

FILE NUMBER: 126-223-MS

ISSUES: Separate charge - furnishings.

This was an appeal by the tenant, Robert Jones, from the Order of Commissioner J. B. Jennings dated the 27th day of August, 1982. This matter came on before Commissioner Jennings by way of an application by the landlord for a whole building review of rents pursuant to section 126 of the Residential Tenancies Act. The landlord was represented by Mr. Chaim Bredin, solicitor, and the tenant by Mr. Terry Edgar, solicitor.

Mr. Jones' Notice of Appeal asked that the Commission establish the value of a separate charge for furnishings which are provided by the landlord in a number of units. It stated that the Commissioner was required to determine the maximum rent for the unit as defined in section 1(1)(k) of the Residential Tenancies Act and he erred in merely determining the 'basic rent' when he was required to determine the 'basic rent' plus all separate charges including the separate charge for furnishings.

The Landlord's application for rent review set out the proposed monthly rent schedule for the five different types of residential units. In this schedule no reference was made to proposed rents for furnishings. In the reasons for the proposed rent, the landlord referred to increases in costs and to recovery of certain capital expenditures. The Detailed List of Proposed Rents similarly omitted any mention of furnishings. It listed present and proposed basic and parking rents only.

However, the Cost Revenue Statement claimed capital expenditures for furnished units only of $52,497. Commissioner Jennings stated in paragraph 18 "There are a number of furnished units in this complex and the ordered amount for each unit as shown on Appendix 'A' applies to the proposed basic rents and not to the separate charges for furnishings ...". He did not consider the capital expenditures of $52,497 and, accordingly, did not determine a separate charge for furnishings.

The tenant's solicitor relied on the definition of 'rent' in section 1(1)(k) of the Act, which "includes the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord or his agent for the right to occupy a rental unit and for any services, and facilities, privilege, accommodation or thing that the landlord provides for the tenant in respect of his occupancy of the rental unit, whether or not a separate charge is made for such services and facilities, privilege, accommodation or thing". He went on to assert that the landlord could not increase the rent for a rental unit by more than 6% by imposing a separate charge without the approval of the Residential Tenancy Commission because separate charges for any services are considered rent.

The tenant's solicitor argued that the only substantive change from the previous arrangement was the provision of furnishings for some units. Therefore, the changes to the units were not so substantial as to create new rental units for which the landlord could freely set first rents. He suggested that the appropriate treatment in determining the rent for furnishings would be to consider the costs as capital expenditures and apply the resultant amortized amounts to the furnished units. The imposition of a charge for new services in any amount the landlord desired would be an effective means of removing units from rent control and consequently should be discouraged by the Commission.

The landlord's solicitor argued that rent review legislation was established to prevent unlawful or unjustified rent increases, not to set or establish what a fair amount of rent should be. In support of this opinion, he pointed out that buildings not in existence prior to 1976 are exempt. Furthermore, section 126 prohibits a landlord from increasing the rent charged by more than 6%, unless otherwise authorized. Therefore, a service not in existence previously could have the charge for it set by the landlord, but any increases thereafter would be subject to the provisions of the Act. Mr. Bredin argued that rent as

defined in the Act is inclusive of amounts charged for services and facilities. Commissioner Jennings, he felt, took the same view and was therefore able to break out the charge for furnishings from the basic rent. By so doing, Commissioner Jennings determined the rent increase applicable to the unit without setting a rent for the newly introduced service.

Section 131(5)(a) of the Residential Tenancies Act reads:

> "Where the Commission has determined and apportioned the total rent increase under this section,
>
> a) the Commission shall make an order setting the maximum rent that may be charged for each rental unit that is under review and the date the rents may take effect..."

It was the Panel's opinion that this section makes it mandatory for a Commissioner to set or establish the rent for each unit. Furthermore, the rent is to include the amount of any consideration for any services and facilities. Section 1(l)(p) of the Residential Tenancies Act defines services and facilities to include furniture, appliances and furnishings. The Residential Tenanices Act does not exclude new services and facilities from the definition of the rent. If it had been the intention of the Legislature to permit a landlord to establish his own rental structure for newly introduced services and facilities it would have explicitly stated so. On the contrary, the Legislature took great care in defining rent and services and facilities. The Panel therefore found that Comm issioner Jennings had erred in not establishing a separate charge for furnishings and went on to do so.

IN THE MATTER OF: 200 Jameson Avenue
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Toronto Apartment Buildings Co. Ltd., landlord

APPEAL PANEL: G. E. Isaac, J. H. Thomson and R. S. Bentley

DATE OF DECISION: June 10, 1983

FILE NUMBER: 126-981-TO

ISSUES: Sub-section 4(a) exemption - transient living accommodation.

This was an appeal by the landlord from the Order of Commissioner Clarke dated the 28th of October, 1982. The landlord asked the Commission to relinquish its jurisdiction over furnished accommodation for the reason that such accommodation is transient and therefore exempt from the Residential Tenancies Act pursuant to sub-section 4(a). Sub-section 4(a) reads as follows:

> 4. This Act does not apply to,
>
> (a) transient living accommodation provided in a hotel, motel, inn, tourist home, hostel or other similar accommodation; (emphasis added)

The subject complex was acquired in 1966 as an apartment building. In 1980 a corporate change in philosophy took place that resulted in apartments having carpeting, furniture, drapery, cutlery and dishes put in when they become vacant. They are then rented on a furnished basis with a fully equipped kitchen and, if desired, maid service. The intent as stated by the landlord is to rent to commercial travelers, employees on government business, theatre groups and others seeking temporary accommodation.

While registration similar to a hotel is not required, a guest application form must be completed. No notice period is required when guests leave and payment may be by credit card. Inventories of the contents of the apartment are taken both when an occupant arrives and when he or she leaves. The average period of stay is four months or less.

The district in which the complex is located is zoned for residential rental accommodation. Because the complex does not provide dining facilities it does not contravene the zoning by-law.

The landlord's solicitor argued that 200 Jameson Avenue comes as close to being a hotel as City of Toronto by-laws allow. The furnished units are similar to efficiency units in hotels. The relationship between occupant and Toronto Apartment Buildings Co. Ltd. is that of licensee-licensor and therefore exempt from the provisions of the Residential Tenancies Act.

The tenants' solicitor stated a low stock of residential rental accommodation, coupled with gouging by landlords, was responsible for rent review legislation. Allowing sub-section 4(a) as a loop-hole, through the provision of furnishings in an apartment, would have serious ramifications by reducing the stock of affordable rental accommodation. In the case of 200 Jameson Avenue, approximately one-half of the present occupants are long-term tenants in unfurnished apartments.

It was the opinion of the Panel that the main similarity to a hotel is that the accommodation provided is furnished. There are, however, differences. The living accommodation provided in a hotel is usually one bedroom, generally with a bathroom. At 200 Jameson it is bachelor, one, two, and three bedroom units, each with bath and full kitchen. Telephones and maid service are provided at no additional charge at hotels, whereas these are at additional cost at 200 Jameson.

At hotels there is no minimum period of stay; at 200 Jameson the minimum period is 4 days. The advertising brochure refers to accommodation as having weekly, monthly and group rates, and evidence indicated the period of average stay was four months. Hotels do not ask for security deposits, whereas 200 Jameson requires a minimum of $200 as a refundable security deposit. Hotels provide dining facilities, 200 Jameson does not. Hotels are not permitted in residentially zoned areas, 200 Jameson is located in one.

However, there are similarities to a hotel other than the provision of furniture. Advance notice to leave is not required; payment may be made by credit card; sub-letting is not permitted. Provincial sales tax is applicable to rents.

While leases are not required for the furnished units, contracts with firms and governments may exist. It was conceded by the landlord that arrangements are sought with organizations for living accommodation longer than the one, two or three day stays generally considered to be the period of occupancy provided as transient living accommodation by hotels.

The Panel found the furnished units at 200 Jameson not sufficiently similar to transient living accommodation to fall under section 4(a) of the Residential Tenancies Act and accordingly affirmed Commissioner Clark's Order establishing the maximum chargeable rent.

IN THE MATTER OF: 342 Frank Street
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Clifford S. Anderson, landlord.

APPEAL PANEL: N. Doorenspleet, M. Green and H. Snyder

DATE OF ORDER: April 20, 1983

FILE NUMBER: 126-303-OT

ISSUES: Section 117(9) re-hearing - ommission of evidence "serious error".

A tenant had appealed Commissioner Bordeleau's Order which resulted from the landlord's application for whole building rent review pursuant to section 126 of the Residential Tenancies Act.

The landlord's form of Variable Rate Loan Agreement was not considered by the Appeal Panel on the original hearing of the appeal because it was illegible. The landlord requested a re-hearing of the appeal pursuant to section 117(9) of the Act, contending that the original Variable Rate Loan Agreement submitted to the Commission was legible, albeit of poor quality, and was made worse upon reproduction through photocopying.

The Panel concluded that the omission of relevant evidence was a serious procedural error. The fact that this occurred under circumstances beyond the control of the Panel was not material. The Panel therefore applied section 117(9) and held a re-hearing, limited to the issue of financing costs. The third mortgage financing was accordingly allowed on the basis of the evidence and a new Appeal Order substituted.

IN THE MATTER OF: 6000 Bathurst Street, North York, Ontario.

AND IN THE MATTER OF an application for rent review by Highmark Properties Limited, landlord.

APPEAL PANEL: G.I. Mandel, H.F. Snyder and J.H. Thomson

DATE OF ORDER: November 12, 1982

FILE NUMBER: 126-251-NY

ISSUES: Revenue - adjustment for lease not made at arm's length.

This was an appeal on behalf of the tenants from the Order of Commissioner Loftus dated March 9, 1982. This matter came on before Commissioner Loftus by way of an application by the landlord pursuant to section 126 of the Residential Tenancies Act. One of the grounds of appeal was the tenants' submission that the rent for apartment #301 should have been adjusted to reflect equivalent rents for similar units.

The occupant of apartment #301 was a shareholder of the previous owner at the time that owner sold this complex to 6000 Bathurst Estates Ltd. Prior to the date of sale he secured for himself a five year lease for this apartment at a rent of $180 per month for the unit and $21 a month each for two indoor parking spaces. The lowest rent then charged for an apartment in the same classification as #301 was $369.81 per month. The landlord was aware of the existence of this lease at the time of purchase.

The Panel did not consider it fair that the other tenants in this complex should have to bear costs that may be attributable to a transaction that was initiated between two parties who were not dealing at arm's length even though the current owner cannot interfere with it until 1985. The Panel therefore adjusted the unit's rent to equal the lowest rent then being charged for similar accommodation and included a proposed rent of $488 so that this unit will carry its full share of costs for the purposes of rent review. Because of the lease agreement however, the amount that the tenant would actually have to pay the landlord was restricted to the amount set out therein.

The Order of Commission Loftus was modified accordingly.

IN THE MATTER OF: 460 Eglinton Avenue East
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by the landlord, Leander Construction Limited, the Roster Construction Company Limited, David Wilchfort and Blanka Wilchfort.

COMMISSIONER: D. B. Braund

DATE OF ORDER: April 18, 1983

FILE NUMBER: 126-019-TO

ISSUES: Operating costs - management and administrative costs.

The landlord applied for a whole building review of rents pursuant to section 126 of the Residential Tenancies Act. Although the Commission usually deems management and administrative costs to be 5% of revenue, the landlord chose to present its actual costs, which amounted to almost 8% of revenue.

The tenants objected that these costs were excessive and included salaries for related persons which should not form the basis for a charge beyond the standard generally used. Total administrative costs for all of the landlord's investments were used for its calculations and there was some question as to whether the allocation to this building was properly calculated on a per-suite basis.

Commissioner Braund took notice of the fact that there are property managers available in the market-place who may be retained to provide virtually all management services, including maintenance supervision, on a fee basis, usually amounting to between 5 and 6 per cent of revenue. He referred to the Divisional Court of Ontario decision in Re Triassic Holdings Ltd., which he took to stand for the proposition that the Commission has the discretion to treat costs in a way other than that in which they are actually incurred, so long as the purpose of rent review legislation is adhered to.

Commissioner Braund felt that management costs should be limited insofar as what is borne by the tenants to the level of costs which would be incurred by using property managers and other outside professionals. He accordingly deemed this cost to be 7% of revenue and allowed a 10% projected increase, subject to adjustment on the next review. Because of the different treatment of this cost from that in the last review, margin adjustment was not considered appropriate.

Note: This Order was appealed to an appeal panel on other grounds.

IN THE MATTER OF: 1 Westbourne Road
Hamilton, Ontario

IN THE MATTER OF an application for rent review by Dieter Cawi, landlord.

COMMISSIONER: K.P. McGuinness

DATE OF ORDER: April 22, 1983

FILE NUMBER: 126-983-HM

ISSUES: Operating costs - rent review fees.

The landlord applied for a review of rents pursuant to section 126 of the Residential Tenancies Act. The landlord claimed $1,100 for rent review fees for Year 2 and $1,200 for the Projected Year. Commissioner McGuinness allowed $550 for Year 2 and $556 for the Projected Year.

The Commissioner observed that it was "perfectly reasonable for a landlord to consult with advisors on this subject, and the costs of obtaining such advice must be considered at a section 126 hearing. However, the amount allowed the landlord for the services of a rent review consultant must be an amount reasonable in the cirsumstances given the size of the building and the complexity of the [application] in question."

The landlord was represented at the hearing by an experienced rent review consultant who also prepared the landlord's application. The time and effort invested by the consultant was apparent. The Commissioner felt the amount which should be allowed for a rent review consultant to be analogous to the award of legal costs made by courts to successful litigants. Since the courts rarely award full recovery of costs, Commissioner McGuinness was of the view that it would be improper for the Commission to adopt a policy of allowing the full rent review fee charged by the landlord's consultant, especially where the fee charged is of a contingency fee nature, as it was here. The Commissioner consequently allowed approximately 50% of the amount claimed for rent review costs.

IN THE MATTER OF: 534 Birchmount Avenue
Scarborough, Ontario

AND IN THE MATTER OF an application for rent review by Robron Investments Limited, landlord.

APPEAL PANEL: G. Isaac, N. Doorenspleet, M. Green

DATE OF ORDER: July 12, 1982

FILE NUMBER: 126-133-SB

ISSUES: Operating costs - taxes.
Financing costs - interest disallowed.

The landlord, Robron Investments Limited, applied for a review of rents pursuant to section 126 of the Residential Tenancies Act. The tenants appealed the Order of Commissioner Harrott, dated December 11, 1981, on two grounds.

Firstly, the tenants contended that the Commissioner should have accepted the amount claimed by the landlord for taxes. The landlord had requested a 7% increase for a cost of $24,000. The tenants specifically disagreed with Commissioner Harrott's finding that it was reasonable to project a 10% tax increase for 1982. The tenants stated that the landlord's forecast should not have been increased by the Commissioner, especially since the expected increase was not known at the time of the hearing. They argued that the proper approach would be a cost correction on a subsequent review, if necessary.

In considering this argument, the appeal panel did not fault Commissioner Harrott's treatment of this item. The panel members stated that while the argument of the tenants may have merit with respect to items of costs which can be controlled by the landlord, the cost of taxes and the increase thereof may properly be judicially noted by the Commission.

Secondly, the tenants asserted that the Commissioner erred in accepting increases in financing costs that were apparently due to the repayment of shareholder loans. They specifically attacked the following statements of Commissioner Harrott:

"According to the landlord at the hearing, the purpose of the increase in the mortgage in 1976 was to allow interest to be paid to the shareholders on their historical advances to the company. By this date principal had been repaid, but not the agreed upon interest rate of 10%."

"It is my understanding that unless otherwise expressed, legislation is prospective in nature. The legislation was bought into existence at the end of 1975 and was back-dated to July 29, 1975. Consequently I believe it would be unfair to consider anything before this date."

"The history of the company (landlord) as evidenced by financial statements shows that it was the intention to repay loans from shareholders. I consider it reasonable that interest on such loans be recognized, as unless there is specific agreement to the contrary, interest on borrowed money is the normal situation."

The tenants also asserted the following:

1) That it is not the intent of the Residential Tenancies Act to provide a return on investment to the landlord or shareholder;

2) That there was no proof provided by the owner that loan payments and interest payments on loans were related to financing increases negotiated in 1966, 1971 and 1976;

3) That 50% of the shareholder loan was advanced by R. Jewitt Limited, the sole owner of the premises, and as such represented a non-arm's length agreement;

4) That the loan represents the owner's equity in the residential premises;

5) That it was not proven that the owner had any legal obligation to retire the loans;

6) That a finding can be made by the Commission with respect to financing prior to the commencement of rent review and that such a finding would not affect the landlord's substantive rights under the

Residential Tenancies Act, and that such a finding does not require the Commission to interpret the Act as retroactive prior to July 29, 1975; and

7) That it would not be unfair to the landlord to consider financing prior to July 29, 1975 or financing after that date.

The balance of an existing mortgage by the landlord to The Canada Trust Company in the amount of $241,000 was paid on July 14, 1976. This mortgage loan was repaid by monthly blended payments of $2,458. On the 26th day of July, 1976 a new mortgage was arranged for the principal sum of $350,000 to be repaid by monthly installments of $3,551, the remaining balance to become due on October 15, 1981. By virtue of a renewal agreement, bearing the date of the 22nd day of October, 1981, the balance of this loan ($338,843) was extended. Monthly payments of $5,123 were arranged to commence November 15, 1981. In summary, there was an increase in the amount of mortgage from $241,000 to $350,000 in the year 1976 and there was an increase in the payments related to the $350,000 from $3,551 to $5,123 per month commencing November 15, 1981.

The tenants further submitted:

a) That the Commission failed to ascertain the real substance of all transactions and activities relating to the complex and the good faith of the participants as required in Section 93(2) of the Act;

b) That the money advanced by the shareholders between 1961 and 1963 was a transaction between parties who where not acting at arm's length;

c) That the Commission has the jurisdiction to disregard the outward form of the transactions and is not bound in this matter by the concept of retroactivity;

d) That the advances by the shareholders in 1976 were not proved to have been required under any agreement;

e) That there was no primary evidence submitted by Robron Investments Limited that could have led the Commissioner to conclude that a 10% interest rate had been historically agreed to;

f) That there was insufficient evidence presented to indicate that the alleged interest owed was due to a bona fide transaction and that there was an expressed intention to pay interest;

g) That the timing of the original advance by the principal owner, R. Jewett, suggests it was investment capital and should therefore be considered equity rather than a loan;

h) That given there was no specific time requirement to pay interest on advances, and that interest was alleged to have been paid after the Residential Premises Rent Review Act was proclaimed, it would be consistent to make the transaction subject to the legislation;

i) That the Residential Premises Rent Review Act and the Residential Tenancies Act do not in substance or intent provide ..t rent increases be allowed for the purpose of providing a return on investment to the landlord or shareholders; and

j) That it would not be consistent with the legislation to recognize the 1976 mortgage renewal of $350,000.

The landlord submitted a copy of a Memorandum of Agreement dated August 30, 1961, made between Ronald Jewett and Robert Sansone as shareholders and Robron Investments Limited whereby the shareholders agreed to advance the corporation the sum of $83,000 as a shareholders' loan. It was further agreed that additional advances be made in such amounts as may reasonably be required and that such advances shall bear interest at the rate of 15% per annum until paid. It is also stated in the agreement that the corporation shall repay the shareholders' loans out of funds not required for its current operations and upon demand the corporation will use its best efforts to obtain funds by way of borrowings. The financial statements as of May 31, 1976 and 1977 do not indicate that there is an amount owing to shareholders for advances or interest owing. On file is a letter dated November 10, 1981 signed by R. Jewett as manager for Robron Investments Limited detailing the amount of shareholders's loans to Robron Investments Limited during the years 1961 to 1973. The amount of interest owing to 1973 is calculated to be $69,365 and a further $22,959 is calculated for the years 1974, 1975 and 1976. The solicitor for the landlord explained that a liability for shareholders' loans was not shown on the financial statements for the

years 1975 and 1976 as the loans had been repaid by that time. The financial statements, as of May 31, 1963, show advances from shareholders of $113,000 in conformity with the explanation given by the landlord. The landlord stated that interest owing for such loans was not entered in the books as there were no earnings to be distributed.

The tenants also submitted copies of the corporate annual information return as of June 1, 1976, of the companies Robron Investments Limited and R. Jewett Limited, indicating identical officers and directors. The landlord stated that originally R. Jewett Limited held 50% of the shares of Robron Investments Limited, while other shareholders representing Mr. Sansone held the remaining 50%. This latter holding was transferred by Mr. Sansone to Mirod Holdings, incorporated on February 23, 1967. Robron then was controlled by R. Jewitt Limited and Mirod Holdings, each having a 50% interest. Mr. Jewitt has no interest in Mirod Holdings, nor does Mr. Sansone have an interest in R. Jewitt Limited. There are shareholders other than the principal shareholders in each of these companies. The Panel therefore found the transactions relating to the acquisition and financing of this property to be at arm's length.

Although financing costs are generally considered as a charge to the operation of a residential complex if the funds were borrowed for the purpose of acquisition or improvement to the related project, in this case the Panel found that the additional borrowings were used for the distribution of an interest reward for borrowings in the past without there having been an expressed liability for interest owing. The Panel concluded that the cost related to the added borrowings should not be considered in the formulation of the rent increase to be allowed and that an increase in such interest costs should therefore be disregarded. Commissioner Harrott's Order was modified accordingly.

IN THE MATTER OF: 107 Roselawn Avenue
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Lampeter Investments Ltd., landlord.

COMMISSIONER: D. B. Braund

DATE OF ORDER: March 31, 1983

FILE NUMBER: 126-129-TO

ISSUES: Capital expenditures - non-arm's length maintenance corporation.

The landlord applied for whole building rent review pursuant to section 126 of the Residential Tenancies Act. The landlord was represented at the hearing by a rent review consultant, Mr. John Andrade, and by Mr. Simon Janowski.

The submissions of the landlord with respect to nine capital expenditures totalling some $78,305, or $3,729 per unit, raised questions of great importance to the Commission. Filed in support of these claimed costs were nine "contracts" between Movic Maintenance & Repair Corp. ("Movic") and the landlord bearing dates between June 10 and October 20, 1982 for work to be done in the period up to February 28, 1983 at the latest and by September 30, 1982 in the earliest case. These contracts were listed in a "Schedule of Restorations".

Also filed in support of these claims was an "opinion letter" from Longmore Construction Managers and Engineers Limited signed by Mr. D. Fraser and Mr. J.H.R. Vierhuis, P. Eng. and dated November 8, 1982. The letter stated that, after two inspections, it was found that the work outlined in the schedule was substantially complete by that date. The opinion was expressed, based on observation and measurement of the work done, and comparison of cost with published data and their experience, that the value of the work shown in the schedule agreed with then current market prices and was consistent with the published data and costs of "similar restorations".

Mr. Fraser appeared at the hearing and explained that his firm had been retained for the opinion letter and appearance by the landlord. He outlined the nature of his investigations and his experience and that of his firm in construction consulting. It was admitted that this was the first time he knew of that his firm had been retained to confirm that work had been done and its cost. He was able to express a range of costs which the landlord might have experienced in the marketplace and the cost shown in each contract was at the upper end of the range stated.

The reason that this evidence was introduced was that Movic is a company which was formed by the son and nephew of Simon Janowski who, with his brother Samuel Janowski, are the principals of the landlord company. The companies then do not deal at arm's length. This did not cause the Commissioner to disregard the costs passing from one legal entity to the other but it did place an onus on the Commission to review the nature and amount of those costs to determine whether they might properly be passed on to the tenants through the rent review process.

Mr. Simon Janowski's evidence on oath was that he was involved in the property as a shareholder of the landlord and was also involved in the routine operations of the building. In May or June, 1982 the landlord decided to apply for rent review and, in conjunction therewith, to do major work on the building through Movic. Although the contracts were worked out at various times, almost all of the work was planned from the beginning. He stated that neither he nor his brother had any direct financial interest in Movic.

Simon Janowski stated that he told Moishe Janowski of the work that was necessary for each building and Moishe Janowski then prepared quotations. No other formal quotations were obtained although the witness had spoken to other people. A letter from one supplier stated that there would be no point in estimating costs unless it was given a 30% chance of getting the work.
Mr. Fraser stated his professional qualifications and experience and that he was retained in October, 1982, not to supervise any of the work or provide quality control, but to give opinions on cost and the completion of work after the fact. He had no access to Movic's sub-contracts, time sheets, bills for materials, or other documents. He expressed that it was often impossible to be certain that some of the work was done because it had been covered, such

as riser work. Only a very few units (one or two) had been entered to inspect work done. It was assumed that the work done was performed as competently as, and with similar materials to, that referred to in the construction cost guides and in the similar projects referred to, except that in some cases a 20% discount had been made because this was a residential and not commercial/industrial project. No useful opinion could be expressed as to the workmanship employed in these projects.

Mr. Fraser was not aware of, and apparently had not considered, whether any work was in compliance with the building code and had not been retained to give an opinion on this. His opinion was that a contractor charges out a worker's wages to a customer at two to two and one-half times the amount incurred, sometimes plus a supervisor. He also stated that if a contractor sub-contracted work he would build 25 to 40 per cent onto the price paid for the owner's bill.

Mr. Moishe Janowski, of Movic, appeared at the first hearing in response to the Commission's Summons to Movic to appear and present its books and records relating to this complex. He had just been served an hour before, wished to seek counsel, and had not had an opportunity to obtain those records before the hearing. He did file those records requested before the reconvened hearing and appeared as a witness under oath. This witness told the Commission that no building permit or plumbing permit was obtained for any of the work involved. He said that all sub-contracts were supervised by Movic but no detail was given of the type or frequency of the supervision or the qualifications of the person involved.

Mr. Andrade stated that there are several possible treatments of the costs involved, resulting from the non-arm's length nature of the contracts, depending upon what the proper function of the Commission should be. The first alternative is to allow the costs provided in the landlord's contracts to pass through; a second would be to allow Movic's cost plus some allowance for overhead and profit; a third would be to allow only Movic's direct costs (this last being the position the tenants adopted).

These alternatives arise because the Act directs the Commission to ascertain the real substance of all transactions relating to the complex and, in so doing, gives the Commission a discretion to disregard the outward form of transactions or the separate corporate existence of participants.

As to the first alternative, Mr. Andrade said that the Commission should interpret the Act on an actual cost basis. That is, if a landlord pays out certain amounts for legitimate expenses related to the complex, these must be recognized in full. Mr. Andrade also tried to support the costs incurred through these contracts on a fair market value approach (or, as a further alternative, whatever might be found on Mr. Fraser's evidence to be market value for the work in each case). By this, it was intended that the cost that would be paid to an arm's length contractor for the same work be recognized on the theory that the only necessary control on non-arm's length transactions should be that tenants do not pay more because of them than they would otherwise.

The Commissioner did not believe that the limitation should be as stated but, rather, that the real cost to the landlord should not be exceeded. This is complicated, however, by having elements involved in real cost other than direct costs paid for materials and labour on an arm's length basis by the non-arm's length participant in the transaction. This means that there should usually be some consideration given to the costs of overhead to Movic or a legal entity in its position.

The landlord's representative stated that the overhead costs for Movic included two salaries and considerable other costs. This was not disputed by the tenants although they felt that these costs should be included in the landlord's management allowance because of the relationship.

The evidence given by Mr. Fraser fell far short of convincing the Commissioner that any particular dollar amount could be assigned to each project since the measurements were not accurate, not all of the work stated in the contracts was completed, and proper information of pre-existing conditions or reliable cost quotations was not available in some instances. Work was not done in many cases to the standard of work and materials that would have been expected from the figures submitted.

The Commissioner considered that some credit should have been given for the work done by the principals of Movic in arranging and supervising work done for the landlord. The amounts given in evidence for usual markups overstated the situation of the present marketplace. However, it was clear from the evidence that this maintenance company was set up specifically to deal with

capital expenditures for rent review purposes and that it involved children of the principals of the landlord. The apprehension would be that the landlord was either creating costs for rent review recovery from the tenants or that this involved some form of estate planning. Movic does not appear to be experienced in construction work, to have planned the work, or obtained permits, and much of the work done was suspect.

It is notable that many of Movic's bills show reference to the landlord or its related company, Plata Investments. Either the landlord directly ordered the work or held out its credibility in order to get the work done. The Commissioner asked Simon Janowski at the hearing whether the landlord had previously done work with several of Movic's sub-contractors and the answer was either "yes" or "I don't recall" for each. The Commissioner therefore had little confidence that Movic, as opposed to the landlord, had any role at all with respect to sub-contractors and did not allow any overhead on top of Movic's actual costs. The landlord's efforts were considered part of the management allowance. For the work done through Movic, the Commissioner believed the landlord's supervision was minimal and the cost he allowed for overhead was the minimum that might be expected in the trade, which he found to be 10% on materials and 25% on labour costs.

IN THE MATTER OF: 40 Earl Street,
Toronto, Ontario.

AND IN THE MATTER OF an application for rent review by 495929 Ontario Limited, landlord.

COMMISSIONER: D. B. Braund

DATE OF ORDER: December 10, 1982

FILE NUMBER: 126-911-TO

ISSUES: Financing costs - acquisition costs - disclosure of principals of landlord corporation.

The landlord applied for a review of rents pursuant to section 126 of the Residential Tenancies Act. The tenants' representative requested that the application be adjourned until the names of the principals of 495929 Ontario Limited were disclosed, or that the application be dismissed. The grounds for this request were that the other parties and the Commission could not, without such information, know whether the landlord dealt at arm's length with any contractor, mortgagee, vendor, etc. or know the identity of witnesses whom the Commission on its own motion or that of the tenants should properly summon to give necessary evidence. It was stated that Section 92 and 93(2) of the Act would imply the necessity of such disclosure and that no provision of the statute either protects the anonymity of any party or prevents a direction to make such disclosure.

The landlord's reply was to the effect that Mr. Samuel Nash is the sole officer and director of the landlord corporation, and that there is neither any relevancy to the information sought nor was it proper to exceed the limits of disclosure otherwise required for Ontario corporations.

According to Commissioner Braund, the contention that Ontario corporations need not reveal the identities of the shareholders (except in very limited situations) under the Business Corporations Act and the Corporate Information Act and that, under the common law, there is a well recognized separate existence of corporations and their members clearly ignores the discretion in Section 93(2) of the Act that the Commission should disregard

the separate corporate existence of the participants to any transaction in determining the real substance of the transaction or the good faith of the participants. To follow the contentions of the landlord would make a mockery of the clearly expressed wish (if not direction) of the Legislature that the Commission, where necessary in its functions, undrape the "corporate veil". The consequence of the landlord's failure to make disclosure is that it may become impossible for the Commissioner to make a "finding" because he would not be convinced by the evidence before him. One of the most basic rights to the parties is that of cross-examination of such persons as the Commissioner believes might have relevant evidence respecting any particular transaction. If this opportunity is denied by the non-disclosure of the identity of a shareholder in a matter where such evidence would be relevant, then the cost arising out of the transaction must be ignored in determining the justified increase under Section 131. Otherwise there would be no consequence to the denial of rights afforded by the legislation.

The landlord failed to answer a "direction" of the Commission expressly given under Section 126(4) of the Act. There are no provisions in Section 126 which deal with the failure of a landlord to comply with a direction and there is no general authority to discontinue a proceeding unless it is found to be trivial, frivolous, vexatious or has not been initiated in good faith (Section 102).

On the other hand, it appears to have been specifically contemplated by Section 126 that the landlord has the onus of proof. The landlord failed to discharge his onus. The fact that the statute provides powers of summons and investigation to the Commision does not limit the onus of proof which rests upon the landlord by necessary implication since virtually all relevant matters are within its control and, often, its sole control.

The Commissioner directed the landlord, by letter, pursuant to Section 126(4) of the Act, to provide the Commission with the names of the individuals who had a direct or indirect interest in the shares of the landlord corporation in order to determine whether to make the findings which the landlord requested. In response the landlord filed a further declaration denying that the corporation is not at arm's length with any participant of the transactions in which the tenant's representative expressed concern.

It is sometimes argued before the Commission by landlords that the word "finding" has a significance that limits the action to be taken to examining and reciting the actual costs of the landlord. In other words they are suggesting that there is no jurisdiction to go another step and interpret the facts discovered against the purpose of the legislation; that is to say, if there is some evidence of a thing, it must be allowed. Commissioner Braund felt that if the legislators had meant to limit the jurisdiction of the Commission thusly it would have used other words to do so. The words "reaching a finding" as used in Section 131 appear to infer a process of interpretation and the rendering of a verdict or decision as a jury or judge would do. A Commissioner must, when faced with contradicted evidence, place weight on the various elements thereof and reach a decision. If a doubt exists which is reasonable and relevant and exists by reason of the fact that the landlord has failed to satisfy the onus of proof, then it is proper for a Commissioner to decline to make a finding. The opposite interpretation of its jurisdiction would relegate the Comission to the function of auditing and would render the tenants' bystanders in the hearings which are required by the statute, since they usually do not have direct evidence available to them.

The evidence with respect to the acquisition and financing of the purchase was to the effect that a transaction involving several buildings took place under power of sale proceedings taken under a former mortgage on this property. There was nothing in the evidence available on this transaction to suggest that it was in any respect other than as presented. But it is possible to construct and document the various aspects of such a transaction in such a way that no prima facie questions would arise and yet the transaction would be other than as it was documented either in substance or in the way that it would likely be treated for rent review purposes.

The Commissioner did not determine that a sale had not taken place, but only that he could not make a finding that it had taken place and therefore could not give effect to it.

Note: This Order has been appealed to an Appeal Panel of the Commission.

IN THE MATTER OF: 7 Heath Street East
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Norman Borofsky, landlord.

APPEAL PANEL: E. J. Pollock, M. S. Green, J. H. Thomson

DATE OF ORDER: September 17, 1982

FILE NUMBER: 126-759-TO

ISSUES: Financing costs - acquisition costs - tax considerations.

This was an appeal on behalf of the landlord from the Order of Commissioner Doorenspleet dated April 1, 1982. This matter came on before Commissioner Doorenspleet by way of application by the landlord under Section 126 of the Residential Tenancies Act for review of the rent of both 7 and 25 Heath Street East, Toronto, Ontario. The Commissioner found that the property, 25 Heath Street East, a house, was not part of the residential complex located at 7 Heath Street, an apartment building, and therefore dismissed the application with respect to 25 Heath Street.

The landlord appealed this Order on the grounds that the Commissioner failed to assign true and realistic acquisition costs and financing costs to the residential complex and did not consider the evidence presented at the hearing.

With respect to the first ground of appeal, dealing with acquisition cost, the landlord's representative discussed the purchase on October 1, 1981 of the two properties for the sum of $1,400,000. The Commissioner had found that 25 Heath Street East was purchased for the sum of $350,000 and that two mortgages totalling $235,000 were registered against the property.

In a copy of an Agreement of Purchase and Sale, the purchase price was also shown as $350,000 and it was indicated that the offer was conditional upon the Agreement of Purchase and Sale of 7 Heath Street East being executed simultaneously.

Commissioner Doorenspleet has also found that 7 Heath Stree. East was purchased for the sum of $1,050,000. The offer was conditional upon the Agreement of Purchase and Sale of 25 Heath Street East being executed simultaneously.

The landlord's agent stated that when the application for rent review was made, both properties were listed as one residential complex and costs applicable to the two properties were supplied. However, it was found by Commissioner Doorenspleet that the two properties did not constitute a residential complex. Accordingly, the hearing was adjourned and it was requested that a new Cost Revenue Statement listing the costs applicable only to 7 Heath Street East be supplied. As indicated in the first ground of appeal, the landlord disputed the acquisition cost of $1,068,141 which the Commissioner found applicable to 7 Heath Street East.

The landlord testified that the sum in each case had been set by the vendor. The landlord considered the allocation of $350,000 to the house to be not realistic and rather high but accepted it because some other offers to purchase had also been made. He said that he considered the cost of the apartment building to be about $1,200,000 and that of the house about $200,000.

Copies of valuations from various sources were submitted in support of the landlord's application for rent review, including opinions regarding 7 Heath Street East by A.E. Le Page Limited and Harvey Adelman Limited; and in respect to 25 Heath Street East by Harvey Kalles Real Estate Limited.

The landlord's agent submitted an additional letter dated May 27, 1982 from William Eisenberg and Company, chartered accountants, in which it was stated that the adjusted cost base of 7 Heath Street East, being used by the landlord in his personal income tax returns, was $1,215,479. This figure included a "re-allocation of a portion of the purchase price of 25 Heath Street East in the amount of $150,000".

The landlord indicated that the down payment on the apartment building was less than 2% of the purchase price whereas the house was paid for fully. He stated that, in his view, the vendor clearly benefitted by the allocation between the two properties because of the application of capital gains tax. When something taxable is sold together with something that is non-taxable,

it is to the benefit of the vendor to arrange sale prices so that the larger gain accrues in the area where no taxes are incurred and to have as low a gain as possible in the area which is taxable.

In the case of a principal residence, any gain accruing is not subject to capital tax. The sale of the house was an all cash deal. In the case of the apartment building, tax would accrue on the profit or capital gain and here it would be important from the tax consideration viewpoint to have as much profit as possible not in cash but by way of mortgages. This is because profit that accrues to the vendor is not taxed immediately but only as the mortgages are paid off. Relatively little cash had been paid in the case of the apartment purchase.

After considering the evidence and argument presented, the Appeal Panel found that the weight of the documented evidence was such that they had to conclude that the purchase price of the residential complex, 7 Heath Street East, was $1,050,000. To find otherwise would have required the Commission to have made a finding that the parties manipulated the apportionment of the purchase price to the properties concerned in order to minimize tax implications for the vendors. There was no evidence before them to that effect.

Commissioner Doorenspleet's Order was varied on other grounds.

IN THE MATTER OF: 752, 754, 764, 770 Chilver Road
Windsor, Ontario

AND IN THE MATTER OF an application for rent review by the executors of the estate of Annie L. Chilver, landlord.

APPEAL PANEL: M.S. Green, J.H. Thomson and R.C. Yurkoski

DATE OF DECISION: March 2, 1983

FILE NUMBER: 127-117-WN

ISSUES: Financing costs - claim for depreciation where property is owned outright.

This was an appeal by the landlord from the Order of Commissioner J. B. Veitch dated June 22, 1982. The residential complex is a two-storey row house containing four rental units. This matter came on before Commissioner Veitch by way of an application by the landlord, under Section 126 of the Residential Tenancies Act, for review of the rents in the residential complex.

The basis of the landlord's appeal as set out in the Notice of Appeal was that the Commissioner's decision did not, in the absence of mortgage interest expense, take account of the capital invested by the landlord. It was submitted that, accordingly, depreciation as per generally accepted accounting principles or, in the alternative, on the basis of capital cost allowance claimable under the Income Tax Act should properly be allowed as an expense.

The landlord's representative stated that the Residential Tenancies Act does not speak of borrowed money but, rather, financing costs. He said that depreciation is a financing cost, one that is recognized in generally accepted accounting principles, and by the Income Tax Act. He repeated his contention that, in this case, where no debt exists and the property is owned outright, depreciation should, nonetheless, be considered as a financing cost.

In the opinion of the Appeal Panel, the depreciation provisions of the Income Tax Act are not appropriate for the purpose of rent review in that a return must be filed each year and at the time of a subsequent sale any over or under depreciation or capital gain can be dealt with. There are no equivalent provisions in the Residential Tenancies Act, which is essentially based on considerations of cash flow and increases in costs between past and projected accounting years. Financing Costs should follow in most cases a "cash flow approach" which permits charges for principal and interest payments, even though this is not a method which coincides with generally accepted accounting principles.

The Panel found it more appropriate to construe the term financing costs, as used in the Residential Tenancies Act, in the usual accounting sense as meaning the cost of borrowed money from whatever source. In the absence of debt, it would not be correct to impute an allowance for depreciation such as the capital cost allowance permitted by federal legislation.

It was not necessary for the Panel to consider the question of an appropriate method of dealing with the cost of borrowed money because there was, in fact, no outstanding debt, and, therefore, no financing costs on which to make findings in accordance with section 131 of the Act.

The Order of Commissioner J. B. Veitch dated June 22, 1982 was accordingly affirmed.

IN THE MATTER OF: 876-878 Lawrence Avenue East
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by S. and S. Lerer Investments Limited, landlord.

APPEAL PANEL: J. H. Thomson, G. E. Isaac and M. S. Green

DATE OF ORDER: March 15, 1983

FILE NUMBER: 126-342-NY

ISSUES: Financing costs - deemed interest rate.

This was an appeal by the landlord from the Order of Commissioner Smith dated August 16, 1982. This matter came on before Commissioner Smith by way of an application by the landlord under section 126 of the Residential Tenancies Act. The landlord appealed on the grounds that the Commissioner erred in deeming the previous financing interest rate to be 10 3/8% instead of allowing the actual rate of 3% in considering the increase in financing costs that had been experienced.

The present mortgage was arranged by way of promissory notes totalling $157,390, to replace the debt assumed by the landlord at the time of purchase. The transaction at the time of purchase was not made at arm's length and was designed to be beneficial to the owner's family. That is, the owner sold his property to the company with an estate plan of some kind in mind and took back preferred shares and promissory notes for the balance of the purchase price. It could be reasonably expected that at some time in the future, the promissory notes would be retired and that replacement financing would be arranged as had actually occurred. However, because the promissory notes were made at a special interest rate, much lower than market rates available at the time of sale, the difference between the special rate, 3%, and the rate of third party financing through the Royal Trust Corporation, 16%, was very large.

In the Appeal Panel's opinion, there was no reason why the tenants should have paid a larger than normal rent increase due to the large increase in financing costs which resulted from the replacing of a special non-arm's length arrangement with a normal mortgage. Accordingly, the Panel found that it would be appropriate during the current review to treat the promissory notes in the form of a notional mortgage at interest rates available at the time of purchase. Since the Commissioner had essentially made an identical finding to that of the Panel, there was no reason to alter his calculation. The Order of Commissioner Smith was varied on other grounds.

IN THE MATTER OF: 225 Markham Road
Scarborough, Ontario

AND IN THE MATTER OF an application for rent review by 225 Markham Road, landlord.

COMMISSIONER: C. E. Harrott

DATE OF ORDER: January 15, 1982

FILE NUMBER: 126-152-SB

ISSUES: Financing costs - recognition of non-arm's length loan.

The landlord applied for rent review pursuant to section 126 of the Residential Tenancies Act. The landlord was a limited company holding the property in trust for a number of tenants in common. There was an agreement by the co-tenants to pay themselves interest on loans to the enterprise, to be absorbed by rent increases.

The tenants' representative asserted that due to the non-arm's length nature of the agreement, no recognition should be given to it, and, in any case, such loans are equivalent to equity and therefore not recognized by the legislation for the purposes of rent determination. The landlord's representative stated that the loans were advanced to the enterprise legitimately, in lieu of additional external loans, and that this arrangement had been beneficial to the tenants, as compared to the cost of external financing.

Commissioner Harrott affirmed the view that "[a] non-arm's length business transaction should not be rejected out of hand simply because it is such". Alternative commercial financing in this case would have been a third mortgage, which it was found would have been more costly. Consequently, the Commissioner declined to reject the agreement simply because it was not made at arm's length.

The intention of the co-tenants had always been to repay these loans when cash became available. This application proposed to recognize the cost of interest at a favourable rate -- bank prime. The Commissioner was unable to find any provision in the Act or guidelines which might invalidate such a

proposition. He felt it reasonable that borrowed money should attract interest, as long as it does not unduly inflate rents as compared to the alternatives available; in this case, it did not. The proposed interest cost on the amount of the loans in existence at the end of 1974 was allowed and findings were made based on a finding of financial loss the landlord had experienced. As this was not a recent acquisition, the full amount was recognized in determining rents.

IN THE MATTER OF: 10 Shallmar Blvd.
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Mayhurst Realty Limited, landlord.

COMMISSIONER: K. S. Sagoo

DATE OF ORDER: August 27, 1982

FILE NUMBER: 126-676-TO

ISSUES: Financing costs - retrospectivity.

This was an application by the landlord for a whole building review pursuant to section 126 of the Residential Tenancies Act.

In dealing with acquisition and financing costs, counsel for the tenants raised the issue of the retrospective, as opposed to retroactive, operation of the Act. He submitted that this Act is an exception to the general presumption that statutes are not retrospective. Therefore, even though the non-arm's length mortgage on the property was placed in 1964, it should be scrutinized in the usual manner.

The landlord's counsel emphasized that the Residential Tenancies Act contains no retrospectivity clause similar to that of the Residential Premises Rent Review Act, S.O. 1975-1976, c. 12, and had the Legislature intended that this new scheme of rent control catch past transactions it would have used language as broad as or broader than that which was used in section 20 of the Residential Premises Rent Review Act.

According to Commissioner Sagoo, to accept the tenants' counsel's submission would entail the subjection of every transaction, from the moment construction on a residential complex was begun, to scrutiny on each and every subsequent review. Clear statutory language would be required to allow an administrative tribunal to embark on such a broad review.

The Commissioner took cognizance of CRAES on STATUTE LAW, 7th Edition, p. 387, which gives the meaning of "retrospective":

> "A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

But a statute is not properly called retrospective because part of the requirement of its operation comes from a time prior to its passing. It is a fundamental of English law "that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction".

Commissioner Sagoo concluded that with respect to substantive rights, a statute will not be presumed to be retrospective in operation unless it clearly says so. He accordingly accepted the existence of the non-arm's length mortgage, although he did adjust the interest rate payable on renewal to bank prime.

IN THE MATTER OF: 200 Woolner Avenue,
Toronto, Ontario.

AND IN THE MATTER OF an application for rent review by 462818 Ontario Limited, landlord.

COMMISSIONER: K. S. Sagoo

DATE OF ORDER: May 17, 1983

FILE NUMBER: 126-699-ET

ISSUES: Financing costs - Third Mortgage.

The landlord applied for a whole building review pursuant to section 126 of the Residential Tenancies Act.

The landlord asked that consideration be given to financing costs arising from that part of a $600,000 loan that fell within the 85% financing limit normally allowed under guideline RR-2. The solicitors for the landlord set out the nature of the transactions involved in the acquisition of the property in the following terms:

> "The purchase price for this property was paid in part by 462818 by the assumption of a mortgage in favour of Victoria & Grey Trust Company and by a mortgage back to the vendors. The balance of the monies required to complete the purchase was provided to 462818 by the shareholders thereof by subscription for shares of 462818. One-half of this balance was obtained by way of loan from the Royal Bank of Canada. The original commitment by the Royal Bank in that regard provided for a direct loan of $600,000 by the Royal Bank to 462818 which would be secured by way of fixed and floating charge debenture which would include a mortgage on 200 Woolner Avenue. However, because of certain legal, business and tax considerations, the loan arrangements had to be restructured so that it was made to shareholders of 462818. These shareholders used the loan proceeds to purchase shares of 462818 on the day the purchase of this property was completed. Although in form the loan was made to the shareholders, in substance the loan was made to enable 462818 to complete this purchase, and in fact the monies were paid directly to the vendor by the Royal Bank pursuant to a direction to do so signed by the shareholder borrowers. The loan was secured, as originally contemplated, by a fixed and floating charge given by 462818 in favour of the Royal Bank, which included a mortgage of 200 Woolner by 462818." (emphasis added)

In summing up their case, the landlord's solicitors submitted that,

(a) the loan was made in good faith between the shareholders of the landlord and the Royal Bank, acting at arm's length and upon commercially reasonable terms;

(b) the loan is fully secured by the debenture and guarantee of the landlord;

(c) this debenture includes a third mortgage of the property in addition to the promise of the landlord to pay the amount of indebtedness; and

(d) the loan was made for the sole purpose of enabling the acquisition of the property by the landlord.

Counsel for the tenants submitted that the shareholders have received a substantial benefit already from their ability (as controlling shareholders) to secure their loans with assets of the landlord by way of a reduced interest rate. To grant them, or the landlord, further benefits at the expense of the tenants would, it was submitted, be clearly contrary to the real merits and justice of the case.

Commissioner Sagoo noted the comment to the landlord by its solicitors dealing with the third mortgage to the effect that the purpose of the debenture was to secure a bank loan to certain individuals for the purpose of providing funds to purchase one-half of the issued and outstanding shares of the purchaser. The Commissioner entertained little doubt that such amount was a down payment or, in real estate terms, the buyer's equity. Therefore no allowance was made, in whole or in part, for the third mortgage.

IN THE MATTER OF: 22 Riverwood Parkway
Etobicoke, Ontario

AND IN THE MATTER OF an application for rent review by UPTA Investments Limited, landlord.

COMMISSIONER: K. S. Sagoo

DATE OF ORDER: April 15, 1983

FILE NUMBER: 126-809-ET

ISSUES: Financing costs - third Mortgage, deemed interest rate.

The landlord applied for a review of rents pursuant to section 126 of the Residential Tenancies Act.

A third mortgage, for the principal amount of $200,000, at an interest rate of 20% was negotiated on April 1, 1982 to pay off an existing third Mortgage, for the same principal amount, at an interest rate of 8.625%.

There had been a dramatic decline in interest rates. During the week of the hearing the trend-setting Bank of Canada rate dropped to 9.53%, the Chartered Bank prime rate to 11.5%, and the conventional first mortgage rate to 12.5%.

The Commissioner was concerned that if the full increase of $19,625 in the third Mortgage, claimed by the landlord, were to be allowed, it would be "locked into" the rents so ordered for all time to come. Even if the mortgage were to be subsequently renewed at a lower rate of interest at the end of the three-year term, or by paying a penalty on an earlier date, the landlord might not apply to the Commission for another review, fearing a reduction in rent increase, thus leaving the tenants no redress.

Although the average rate of 20% for a third mortgage was, in fact, the prevailing rate at the time of the renewal in 1982 the Commissioner felt that the average rate for a third mortgage in 1983 would be 15%, and that in 1984

it would be still lower at 13%. Over the three-year term of the mortgage, the total rate would be 48% or, in other words, a deemed average rate of 16% per year. The Commissioner therefore allowed an increase in financing on this mortgage of the average imputed rate of 16%.

IN THE MATTER OF: 1 Marquette Avenue
Downsview, Ontario.

AND IN THE MATTER OF an application for rent review by Bill and Magda Zalai, landlords.

APPEAL PANEL: N. B. Doorenspleet, M. S. Green and E. J. Pollock

DATE OF DECISION: October 7, 1982

FILE NUMBER: 126-335-NY

ISSUES: Financial loss calculation.

The 24-unit residential complex known as 1 Marquette Avenue, Downsview, Ontario, was purchased in May 1974 by the partnership of Bill and Magda Zalai, joint tenants, and Ernest and Ilona Klein, joint tenants, on the basis of a 60%/40% interest, respectively. In February 1981 the Zalais purchased the Kleins' 40% interest in this residential complex.

The landlord, Bill and Magda Zalai, filed an application for rent review under Section 126 of the Residential Tenancies Act in October 1981 for an increase in rents to commence January 1, 1982.

Commissioner Loftus made a finding that a financial loss existed on this residential complex as of December 31, 1981 in the amount of $534, which finding was the subject of this appeal. The landlord contended that the Commissioner should have calculated the financial loss by applying the mortgage costs to only 40% of the operation since the second mortgage arose on the acquisition of a 40% interest in the building. By calculating the financial loss on 100% of the operation, it was argued, any profits that existed within the initially owned 60% of the operation were effectively wiped out. In other words, the financial loss resulting from the purchase of the 40% interest ought to stand alone and the operating profit on the already-owned 60% interest ought not to be set off against it.

The Appeal Panel considered this argument and rejected it. Section 131(2) of the Act directs the Commission to consider "increases in financing costs resulting from the landlord's purchase of the residential complex only to the extent necessary to prevent a financial loss by the landlord". (Emphasis added). The panel concluded that in order to support the landlord's proposition, section 131(2) would have to have read "... residential complex or any part thereof ...", which is not the case. Therefore, the Panel affirmed the Order of Commissioner Loftus.

IN THE MATTER OF: 15 Nelson Street, Bowmanville.

AND IN THE MATTER OF an application for rent review by D. J. Presson, landlord.

APPEAL PANEL: N. Doorenspleet, N. Myrhorod and J. Pollock

DATE OF DECISION: July 21, 1982

FILE NUMBER: 126-68-OA

ISSUES: Financial loss - treatment of interest on loans used to carry financial loss.

The landlord applied for a review of rents under section 126 of the Residential Tenancies Act. Commissioner Mandel did not consider it appropriate to eliminate all of the landlord's financial loss on the current review. The landlord argued that the costs incurred to carry the resultant longer term losses should be included as an increased operating cost. The Commissioner noted that any increase in rents granted at that time to carry the loss would amount to a profit of equal proportions when the loss is eliminated, contrary to the intent of sub-section 131(2). He accordingly rejected the landlord's argument.

Commission Guideline #4 referred to by the Commissioner deals with the treatment of a financial loss. Specifically the guideline explains that where a financial loss results directly from normal operating circumstances a rental increase sufficient to eliminate any future loss within the period under review would be justified. A loss resulting from a purchase and related increased financing costs is considered a loss resulting from other than normal circumstances in which case a rental increase may be justified which would be sufficient to bring a landlord to a break even position over a period of 3 years. This is done because rentals being paid in many buildings reflect the financing costs of the vendor. When such a building is purchased the new owner may incur financing costs which are considerably higher.

The Appeal Panel approved the Commissioner's decision to spread the financial loss resulting from the purchase and related increased financing costs over a period of three years in order to avoid unnecessary hardship to landlord and tenants alike. The landlord purchased this property at a time when he should have been aware of the existing legislation and the administration thereof. A prudent purchaser would have taken notice and realized that sufficient working capital is a requirement under such conditions. To have included an allowance for relief of hardship or to have allowed the interest charges claimed would have been inconsistent with the inability to find justification for allowing all of the financial loss. The Order of Commissioner Mandel was accordingly affirmed.

IN THE MATTER OF: 807 Robinson Street
Burlington, Ontario

AND IN THE MATTER OF an application for Rent Review by K. Kwasniewska, landlord.

COMMISSIONER: Harold M. Little

DATE OF ORDER: September 15, 1982

FILE NUMBER: 126-603-HM

ISSUES: Negative cost correction.

The landlord applied for a whole building review of rents pursuant to section 126 of the Residential Tenancies Act.

There was a large negative cost correction due to anticipated financing cost increases which never materialized. The cost correction far exceeded the total allowable increases in all other categories. Therefore no increase in rents was justified. In the absence of any legislative provision contemplating a rollback of rents under such circumstances, the Commissioner decided that he was left with no recourse but to order rents in the amounts then being charged.

IN THE MATTER OF: Burnview Place
3201 Lawrence Avenue East
Scarborough, Ontario.

AND IN THE MATTER OF an application for rent review by 394537 Ontario Limited, landlord.

APPEAL PANEL: R.S. Bentley, E.J. Pollock and J.H. Thomson

DATE OF ORDER: July 27, 1982

FILE NUMBER: 126-173-SB

ISSUES: Standard of maintenance and repair.

This was an appeal by the tenants from the Order of Commissioner Harrott dated March 3, 1982. This matter came on before Commissioner Harrott by way of an application by the landlord under section 126 of the Residential Tenancies Act. The tenants disputed the lack of a finding by the Commissioner that the standard of maintenance and repair had deteriorated.

The tenants' representative said that the problem was essentially the lack of attention on the part of the landlord to items of maintenance, including specific items referred to the superintendent and property manager by individual tenants. He said that the whole building had been in a state of upset during the past several months because "work supplies, cleaning supplies and general junk" had been left in the hallways and laundry rooms during repairs to the walls.

In the Panel's opinion, based on the evidence, although the property manager endeavoured to improve the response to maintenance problems, the standard of maintenance and repair had deteriorated during the period under review. The tenants were inconvenienced and had to endure the upset and disruption occasioned by the work associated with major repairs within the building itself, namely repairs to corridor walls and repairs to and painting of stairways and laundry rooms.

The time taken for these major repairs extended at least 4 months beyond that which could be considered normal and tolerable to the tenants; and, therefore, the tenants should be compensated to some extent. Although it is not possible to determine compensation with mathematical precision, the Panel found it equitable in this instance to consider that an upset allowance of $5 per unit for a period of 4 months should be made and, therefore, the amount of $2,420 ($5 X 4 months X 12 units) was removed from the total justified increase determined during the review.

Commissioner Harrott's Order was modified accordingly.

IN THE MATTER OF: 111 Raglan Avenue
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Barney River Investments Ltd., landlord.

COMMISSIONER: D. B. Braund

DATE OF ORDER: August 26, 1982

FILE NUMBER: 126-47-NY

ISSUES: Standard of maintenance and repair.

The landlord applied for whole building rent review pursuant to section 126 of the Residential Tenancies Act.

Based on the evidence of the parties present at the hearing, Commissioner Braund concluded that there was a significant deterioration in the standard of maintenance of the building. The Commission had considered this issue in the previous review and had concluded that there were several serious deficiencies. No reduction was made in the last increase, however, in part because the landlord first learned of the degree of the problems through that hearing. It appeared on this review that the landlord had not rectified the problems then raised and, in fact, matters had become worse.

The Commissioner was not convinced by the argument that financial loss makes it impossible to resolve these problems. Although the present owners had only been involved for slightly more than a year, the Commissioner felt it necessary to give effect to his finding that a deterioration in the standard of maintenance and repair had occurred. He therefore reduced the percentage by which he allowed maintenance costs to increase in the projected year to only 6%. In this way the landlord might have the reduction back in the future, by way of cost correction, by spending more than the amount allowed.

IN THE MATTER OF: 77 Spencer Avenue
Toronto, Ontario

AND IN THE MATTER OF an application for rent review by Abbacorp Properties Limited, landlord.

COMMISSIONER: K. S. Sagoo

DATE OF ORDER: July 6, 1982

FILE NUMBER: 126-827-TO

ISSUES: Standard of maintenance and repair.

The landlord applied for a review of rents pursuant to section 126 of the Residential Tenancies Act.

Section 131(1)(c) of the Act provides that in determining the total rent increase that is justified for a residential complex, one of the elements the Commission is to consider is "an improvement or deterioration in the standard of maintenance and repair of the residential complex or any rental unit located therein".

The tenant's representative alleged, and the landlord's agent conceded, that there had been a gradual deterioration in maintenance ever since the present owners took over the property. The tenant representative asked for a token reduction of $5.00 per month per unit in the rents ordered by the Commission. The landlord's agent asserted that as the building had operated on a negative cash flow since its purchase, he did not have the funds for necessary repairs.

Commissioner Sagoo quoted Guideline RR-7 which states, in part:

> "A reduction in the standard of maintenance could in some cases lead to a determination of an increase in the total rent justified, if it is established to the satisfaction of the Commission that the costs of maintaining the original standard of maintenance have escalated to the point where the landlord is financially unable to maintain such a standard with the current rent receipts, and where it is felt that in order to upgrade the current perhaps unacceptable standard of maintenance to at least the previous level would require an increase in rental revenue."

The Commissioner agreed with the guideline in this instance. To enable the landlord to continue with the necessary improvements, he allowed a 12% increase on all items of repairs and maintenance. The proposal for reduction of rents by $5.00 per month was unacceptable to the Commissioner as it would have added to the landlord's financial difficulties and would have resulted in further deterioration of the property.

IN THE MATTER OF:	Apartment 105 1129 Meadowlands Drive Nepean, Ontario
BETWEEN:	Stephen J. Spour (Tenant) - and - Minto Management Limited (Landlord)
APPEAL PANEL:	D.B. Braund, E.J. Pollock, R.C. Yurkoski
DATE OF DECISION:	November 10, 1983
FILE NUMBER:	127-498-OT
ISSUES:	- Allegation of Bias - Section 127 - determination of lawful rent

This was an application filed pursuant to Section 127 of the Residential Tenancies Act by Stephen J. Spour, tenant, disputing an intended rent increase. Minto Management Limited, the landlord, was represented at the hearing by G. Chenier, Vice-President, and by L. Gilbert, its solicitor.

At the commencement of the hearing the landlord requested that these proceedings be adjourned pending the outcome of a motion presently before the Supreme Court of Ontario. Mr. Gilbert explained that on February 11, 1983, the landlord had filed a Notice of Motion requesting an Order pursuant to Rules 611 and 612 "declaring and determining the rights of the parties as to what rents are payable for the said residential premises, or for such other Order as may seem just". Mr. Gilbert offered that this type of application is heard in weekly court and permits the court to make adjudications and determinations on the rights of the parties. Minto, he continued, is seeking "very simply, a determination as to what rents are to be paid". Mr. Gilbert argued that the Commission is not the proper forum for the resolution of this matter because he and his client perceive that a bias exists, and accordingly his client's rights would be prejudiced if these proceedings continued. Mr. Gilbert was concerned about two letters written by Commission staff in

response to enquiries made by tenants. Reference was also made to an Order issued by Commissioner G. R. Tait on March 19, 1982, respecting the maximum chargeable rents for the units located in The Grenadier Apartments. Mr. Gilbert was concerned primarily with paragraph 69 of the Reasons accompanying that Order. Mr. Gilbert took the position that these letters and Commissioner Tait's Order express the opinions of the Commission in the very matters which are the subject of this tenant's application, and accordingly these matters have been pre-judged. Mr. Gilbert commented that it would be more expeditious to seek a ruling pursuant to Rules 611 and 612 of the Supreme Court of Ontario than it would be to continue before the Commission, appeal any adverse decision, then apply to the court on this point of law.

The tenant-applicant, Mr. Spour, commented that the legislators created the Commission in order to unburden the courts of such matters and that the Residential Tenancies Act compels the Commission to "help-out" and promote mediation and conciliation. Mr. Spour argued that a hearing before the Commission was the proper forum for the disposition of the matters raised by his application.

After due consideration of the issues raised by the parties on this preliminary matter, the Commissioner rejected the landlord's request for an adjournment. Because public confidence in the administration of justice demands that decision-makers be seen as impartial and free from even the suspicion of bias, the Commissioner undertook to question the landlord and his agent to determine whether the apprehension of bias resulted from any pecuniary interest which the parties might perceive he might have had in respect of the property in question or from some association, either friendly or otherwise, the Commissioner might have had with either of the parties. Mr. Gilbert conceded that the perceived bias was based solely on the issue of the independence of a Commissioner exercising a judicial authority where a Commissioner or a Commission employee has offered an opinion on an issue. Mr. Gilbert argued that there exists an institutional bias and that this perceived bias fettered the Commissioner's discretion.

The Commissioner strongly disagreed with Mr. Gilbert. The Residential Tenancy Commission is an administrative tribunal with a tripartite responsibility to inform, mediate, and adjudicate according to the mandate

given it by the Residential Tenancies Act. Section 81(c) of the Act clearly directs the Commission to:

> "Advise and assist the public on all residential tenancy matters including referral where appropriate to social services and public housing agencies."

The officers of the Commission who reply to enquiries put to them by the public are complying with a statutory direction. Section 82 of the Statute further directs the Commission to make available for examination "All policy guidelines ...". These policy guidelines are interpretations of issues which may arise under this Act. It is clear that the legislators envisioned a body which would, from time to time, express opinions and offer comment on issues and the application of the Act.

Mr. Gilbert argued that there was an institutional bias because an employee of the Commission expressed an opinion on the issues before the Commissioner. By this, Mr. Gilbert meant that a Commissioner would be bound by an opinion, interpretation guideline, or stated policy of the Commission.

The Commissioner referred to a decision of the Divisional Court, Minto Construction Ltd. et al and The Queen in Right of the Province of Ontario et al, (1976) 15 O.R. (2d) 15 (Div. Ct.), wherein the justices found that a Rent Review Officer's discretion was not fettered by policy guidelines or published opinions, and that his or her discretion was governed by the Residential Premises Rent Review Act, S.O. 1975 (2nd Session), c. 12, and the regulations. The Commissioner was of the view that this decision can be extended to cover the role of a Commissioner under the Residential Tenancies Act. A Commissioner is not bound by the decisions of other Commissioners, and, as with most administrative tribunals, the decisions of the Commission do not create a precedent. The interpretation guidelines are factors which a Commissioner may consider but he or she is not bound by them. By inference, the justices acknowledged that an administrative tribunal has a responsibility to inform itself and this responsibility does not interfere with its adjudicative function.

Sub-section 84(1) grants the Commission:

> "exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Act and as to any matter or thing in respect of which any power, authority or decision is conferred upon the Commission."

The application filed by the tenant was filed pursuant to Section 127 of the Act and is clearly a matter arising under this Statute. The determination of the rents that may be charged is a responsibility of a Commissioner under Section 132(2).

As for the argument that the matter could be more expeditiously resolved before the courts, the Commissioner found this point to be invalid in light of the Commission's exclusive jurisdiction to deal with such issues. Mr. Gilbert contended that his objection was based on a point of law. The Commissioner found this objection to be premature and that the rights of all parties would better be served through a full hearing before the Commission and subsequent appeals if necessary. The Commissioner proceeded to hear the application and reminded the parties that any decision would be upon the real merits and justice of the case. The proper forum for the resolution of these matters is a hearing before the Residential Tenancy Commission.

The parties confirmed that during the period January 16, 1982 to February 28, 1983, the monthly rent for the said premises was $322.34 including one outdoor parking space.

On March 19, 1982, Commissioner Tait issued an Order following the hearing of an application filed by Minto Management Limited pursuant to Section 126 of the Residential Tenancies Act. This Order established that the maximum chargeable monthly rent for Apt. 105 excluding separate charges was $348.00 effective January 16, 1982. The maximum monthly rent including one outdoor parking space beginning January 16, 1982, was $363.00. However, because of the existing lease agreement, the landlord could only charge $322.34.

On or about November 26, 1982, Minto Management Limited advised Mr. Spour of a monthly rent increase of $62.44 or 19.4% of the current rent charged, to be effective the 1st day of March 1983. The total proposed monthly rent was $384.78 including one outdoor parking space.

The tenant argued that the rent that may be charged is dependent upon a determination of the base rent on which to construct the lawfully chargeable increase. Mr. Spour offered his opinion that the maximum chargeable rent increase should be limited to 6% of the last rent that was charged for an equivalent rental period as provided for in Section 125 of the Residential Tenancies Act. This approach would establish the new rent as being $341.68.

In response to the tenant's comments regarding the legally chargeable rent, Mr. Gilbert explained that a proper interpretation of the Act would allow for an increase in rent of 6% over the amount set out in Commissioner Tait's Order.

Mr. Gilbert believed that Commissioner Tait used the authority of this section to equalize rents and that other tenants who did not benefit from a tenancy agreement for an amount lesser than the amount stipulated in that Order would be subjected to an increase of 6% over the ordered amount during the next rental period. The landlord suffered a shortfall in revenue as a result of the agreement with Mr. Spour. Adopting the ordered rent as the maximum rent would serve to perpetuate the shortfall. This, it was argued, would deny the landlord the cost pass-through provided in the statute.

The landlord's solicitor then referred to Section 2(1) of the Act, which reads:

> "This Act applies to rental units in residential complexes and to tenancy agreements, despite any other Act and despite any agreement or waiver to the contrary."

Mr. Gilbert commented that in retrospect, this section would have allowed the landlord to collect the rent ordered by Commissioner Tait. He also emphasized that the Act causes the Order to supercede any agreement and accordingly any future rent increases should be based on the ordered amount.

Mr. Gilbert quoted Section 125 of the Act which reads as follows:

> "Unless otherwise authorized under this Act, no landlord shall increase the rent charged for a rental unit by more than 6 per cent of the last rent that was charged for an equivalent rental period."

Mr. Gilbert argued that the Order is a charge and, as such, imposes a pecuniary liability. Once a landlord applies for rent review, a procedure which is imposed on the landlord, the resulting Order is a charge, an obligation to pay, and any future increase should be based on that charge.

Mr. Gilbert concluded that to deny the landlord the right to increase the rent to 6% beyond the rent established by the Order of the Commission for the past rental period would impose a hardship on the landlord and thus would be an injustice.

The Commissioner rejected Mr. Gilbert's argument that an Order of the Residential Tenancy Commission imposes a pecuniary liability. An Order issued pursuant to Sections 126 and 131 of the Residential Tenancies Act establishes a maximum rent that may be charged. Orders of the Commission should not be interpreted as Orders of compliance. These are Orders which impose limitations but do not direct the payment of a specific rent. Since it was the intention of the legislators to provide for constraints on rent increases, it follows that the limitation imposed is a "ceiling" to which rents may rise and not an Order to pay a specific rent.

Commissioner LeDuc found the maximum chargeable rent to be $363 per month. This was the amount established by Commissioner Tait in his Order of March 19, 1982. The rent level established by that Order was never achieved because of an agreement between the parties for a lesser rent. Commissioner LeDuc considered that the use of the words "unless otherwise authorized" in section 125 would allow for the rent to be increased up to the ordered amount, even though this resulted in an actual increase of greater than 6%. However, he did not accept the landlord's contention that a further 6% increase was also permissible. The rent for the unit was declared accordingly.

The landlord appealed this Order on the grounds that the Commissioner had erred in calculating the maximum rent that could be charged. The landlord again asserted its position that an increase up to the sum of the previously ordered amount plus 6% should have been permitted.

The appeal panel agreed with Commissioner LeDuc that the landlord's arguments must fail. The panel stated that the amount that could be collected by the landlord was the greater of the ordered rent or the sum of the last rent charged plus 6%.

In the result, the Order of Commissioner LeDuc was affirmed.

Note: The landlord has appealed this Decision to the Divisional Court of the Supreme Court of Ontario.

IN THE MATTER OF:	Town House 66, 740 Kennedy Road, Scarborough, Ontario.
BETWEEN:	Alan Miller (Tenant) - and - Donlee Holdings Limited (Landlord)
COMMISSIONER:	C. E. Harrott
DATE OF DECISION:	April 19, 1983
FILE NUMBER:	129-217-SB
ISSUES:	Section 128 - extensive renovations - Guideline RR-9.

The landlord's rental unit was destroyed by fire in March 1981. At that time, the rent for the unit had been $295 per month. On reconstruction, the unit was changed from two bedrooms/one bath to three bedrooms/two baths. About 125 square feet of living area was added to the unit. The renovation was funded by $24,000 of insurance proceeds and a $7,000 contribution by the landlord. After reconstruction, the landlord had no other comparable unit.

The tenant moved into the unit in August, 1981, and paid rent of $560 per month. When he discovered that the prior rent had been $295, he made an application under section 129 of the Act for a rent rebate.

The Commissioner considered that in this case, section 128 of the Act would be applicable. He accepted the reasoning used in Guideline RR-9, which suggests that extensive renovations may have the effect of creating a new unit and thereby rendering section 128 applicable. Since there was no comparable unit against which to examine the rent set by the landlord, the Commissioner accepted the $560 figure as the lawful rent.

The tenant's application was dismissed accordingly.

IN THE MATTER OF: 915 and 921 Midland Avenue
Scarborough, Ontario

AND IN THE MATTER OF an application to consider exemption from rent review by Allport Investments Ltd., landlord.

APPEAL PANEL: H. F. Snyder, J. H. Thomson, G. I. Mandel

DATE OF DECISION: October 29, 1982

FILE NUMBER: 126-169-SB

ISSUES: Section 134(1)(c)/Section 128 - exemptions

This was an appeal by the tenants from the decision of Commissioner C. E. Harrott issued on March 9, 1982. The Commissioner had decided that Part XI, Rent Review, of the Residential Tenancies Act did not apply to this residential complex. The initial application under sub-section 84(2) of the Act was properly made in accordance with Commission Guideline P-7, "Applications to Consider Exemption from Rent Review".

The tenants submitted that "reconstruction consisted of renovations only; most improvements had nothing to do with the buildings per se and all replacement of outworn materials and normal and necessary maintenance [were] for the continued use of the buildings as residential properties".

The residential complex in question, consisting of two buildings of 98 units each, was constructed in 1960. In 1974 a draft plan of condominium was submitted to the Ministry of Housing for each building to permit the sale of units. In 1975, draft plan approval was given by the Ministry, and on October 14, 1975, the Borough of Scarborough, by resolution of Council, granted an approval subject to conditions. On May 16, 1980, the two buildings together with the common areas were registered as York Condominium 517 and units became available for sale.

The owners, in 1977 and 1978, undertook and made extensive renovations and improvements to the residential complex. Some of these were in response to building deficiencies as noted in a Borough report dated July 31, 1975; others were at the instigation of the owners, to upgrade in anticipation of sale of the units as condominiums. In addition, the owners undertook some significant site redevelopment and purchased an additional parcel of land. Details of the work were not in dispute.

To accomplish the renovations, the landlord required vacant possession at various times of all the rental units. The period of vacant possession of individual units ranged from 28 to 66 months and averaged 47 months. Vacancies occurred over the period April 1, 1975 through November 30, 1980.

For reasons not of concern to the Appeal Panel, the owners did not proceed with the sale of the units and none were sold. As the renovation work was completed, the units were rented again, the first being rented on January 1, 1979.

Commissioner Harrott at paragraph 3(iii) of his Reasons stated:

> "**3(iii)** A reading of the relevant sections of the legislation and guidelines makes two things apparent:
>
> > **(1)** When our legislators established rent review, they wanted it to apply to (with some exceptions) to rental units already in existence, whether rented or not, and to exclude all units coming on the rental market not in existence at that time. For buildings in the process of renting at that time, a landlord would have the right to set his own first rent rate, and thereafter the provisions of the legislation would apply.
> >
> > **(2)** Nothing gives the indication that a unit first being rented after December 31st, 1975, had to be "new", in order to qualify for the exclusion clause."

Based on these two premises, and with the support of Commission Guideline RR-9, "Re-Renting of Unoccupied and Renovated Units", Commissioner Harrott reasoned and then concluded, on the basis of a liberal interpretation of the legislation and legislative intent, that all of the rental units in the residential complex were exempted from the Act under section 134(1)(c) by virtue of renovations and reconstruction so extensive as to destroy the rental history of the units.

Commissioner Harrott in his determinations stated that he accepted the landlord's argument made at the initial hearing and as set out in paragraph 3(iv) of his Reasons, "that renovations, reconstruction, etc. has been so extensive as to destroy the rental history of all the rental units". He also implicitly accepted the landlord's further argument that the "two buildings concerned can no longer be considered the same buildings as existed previously". By extension, Commissioner Harrott then determined that Section 128 of the Act should not apply in this matter, since if the character of one unit has changed sufficiently to exempt it (by virtue of it no longer having a rental history), then by extrapolation and multiplication when all units are altered in such a fashion as to destroy their rental history, the whole building or residential complex is forever exempted from Rent Review.

The tenants argued that notwithstanding the extent of the renovations, the two buildings are still structurally the same. There was no demolition required to achieve the renovations, nor was there a major change to the fabric of the buildings during renovation. The configuration of the suites remains unchanged and there are still the same number of suites. It was submitted that much of the work done, although obviously significant and of a capital nature, was in response to a building deficiency report of the Borough of Scarborough dated July 31, 1972. Other work, the tenants' solicitor argued, was required to bring the buildings back from years of accumulated deterioration or deferred maintenance or to respond to building operational problems.

The tenants contended that the object of the legislation was to offer tenant protection and with particular reference to Part XI, to afford tenants protection against unjustified rent increases. To construe as did Commissioner Harrott, that significant renovation to all units in a building makes the whole building a new building, that in law did not exist prior to January 1, 1976, and thus completely and forever exempt from the Rent Review provisions of the Act, is in disharmony with the object and the scheme of the legislation. To put this construction on the Act and the particular sections, would invite Rent Review avoidance by rental unit renovation by landlords, leading to a flood of applications to the Commission for subjective determinations as to whether the renovations were significant enough to warrant exemption.

The Appeal Panel was of the view that Commissioner Harrott had not looked at the Residential Tenancies Act in its entire context. He had not considered the overall object of Part XI which is to review or control rents. There is a definitive scheme put in place by the legislation to achieve that control. The legislation, at Section 4, sets out general exemptions from the Act. Section 134 sets out exemptions from Part XI, Rent Review. The exemptions are specific and should be read with their precise and plain English meaning.

The Appeal Panel looked at the object of the Act, its scheme, and the plain English meaning of Section 134(1)(c):

> "134(1) The following units are exempt from this part:
>
> (c) a rental unit situate in a building, no part of which was occupied as a rental unit before the 1st day of January, 1976."

The facts are that rental units in these buildings were occupied before the 1st day of January 1976. A plain English construction of Section 134(1)(c) leads to the conclusion that all rental units in the building(s) are subject to the provisions of Part XI, Rent Review.

The Panel took the matter one step further and stated that Section 128 of the Act applied. Each unit in each of the two buildings in the residential complex was not rented for a period in excess of twelve months. Accordingly, the landlord was free to set the rent for each unit in accordance with the provisions of Section 128 when it was first re-rented. Following the establishment of the first rent for each rental unit in accordance with Section 128, the general provisions of the scheme set out in Part XI again applied.

Note: The landlord has appealed this decision to the Divisional Court of the Supreme Court of Ontario.

IN THE MATTER OF: 33 Walton Drive
Downstairs Apartment
Aurora, Ontario

BETWEEN: Hieu Dang (Tenant)
- and -
Bob Wood (Landlord)

COMMISSIONER: David J. Burnside

DATE OF ORDER: May 27, 1983

FILE NUMBER: 129-541-NY

ISSUES: Section 129 - base rent.

The tenant applied under section 129 of the Residential Tenancies Act for a rebate of illegal rent paid.

During the respective periods the tenant paid the following monthly rents for the subject premises:

December	1979	through December	1980	$310
January	1981	through December	1981	$340
January	1983	through December	1982	$380
January	1983	through April	1983	$425

The tenant submitted that the sum of $310 should be considered the monthly base rent and that 6% increases should be considered on cumulative amounts with the effective dates of such increases to be January 1 of the years 1981, 1982 and 1983. Based on this submission, the suggested monthly rents would have been the following during the periods set out:

December	1979	through December	1980	$310.00
January	1981	through December	1981	$328.60
January	1982	through December	1982	$348.32
January	1983	through April	1983	$369.22

The landlord submitted evidence by way of deposit slips indicating that a "D. Loranger" paid $370 a month for the premises which are the subject matter of this application. The landlord submitted that he could have rented the subject premises for $360 a month in December of 1979 and that 6% increases should be considered on cumulative amounts with the effective

dates of such increases to be January 1 of the years 1981, 1982 and 1983. The landlord further submitted that since he had always charged the tenant less than the rent he could have charged, he did not owe the tenant anything.

The landlord submitted at the hearing that the reason why he had rented the subject premises in December of 1979 to Hieu Dang for $310 per month was that he had been approached by the sponsors of Hieu Dang (who was originally from Vietnam) to accept this lower amount out of compassion to him under the circumstances. The landlord further submitted that at this time (December of 1979) he stated to Hieu Dang's sponsors that this lower rent was not to be indefinite and that he hoped to see it up near the amount he had previously received from "D. Loranger". The issue to be determined was what figure was to be accepted as the legal rent for the month of December 1979. In essence, the tenant suggested the amount actually paid and the landlord suggested the amount he could have received based on previous tenancies.

Commissioner Burnside commented that a landlord, in accepting a lower rent than previously charged may, in doing so, compromise his position that a higher rent should attach to the rental unit in question. Commissioner Burnside was of the opinion that a tenant's rights would be compromised, if not abrogated, if a landlord could charge a lower rent to a tenant to begin with, and then, once the tenant was in occupation, raise the rent more than 6% based on the fact that previously he was able to receive more money for the rental unit, without a specific arrangement or agreement to this effect.

Because of the lack of evidence that such an agreement or arrangement as submitted by the landlord existed between the landlord and the tenant, as evidenced by documents or otherwise, the Commissioner found that the legal base rent for this rental unit in December of 1979 was $310 per month. A rebate of illegal rent paid was accordingly ordered.

An appeal of this decision by the landlord to an appeal panel of the Commission was dismissed, for failure of the landlord to comply with certain technical requirements of the statute.

IN THE MATTER OF: 1227 King Street West
Hamilton, Ontario

AND IN THE MATTER OF an application for rent review by McMaster University, landlord.

COMMISSIONER: K.P. McGuinness

DATE OF ORDER: June 24, 1982

FILE NUMBER: 126-828-HM

ISSUES: Clause 134(1)(f) - educational institution exemption.

This was an application by a landlord under section 126 of the Residential Tenancies Act for an Order by the Commission authorizing the landlord to increase the rent charged for a rental unit, by an amount in excess of 6% of the current rent. The rental unit is a single family dwelling. The landlord is McMaster University, an educational institution.

The rental unit is one of 55 homes acquired by McMaster University in 1969, for a planned expansion of its medical centre. The expansion never took place. In the intervening years, McMaster University decided to rent these homes as single family residences. There is no policy of renting these houses only to University students or staff. However, in actual fact, the largest number of these houses were rented by staff members. The tenant was a staff member of the university.

Clause 134(1)(f) of the Residential Tenancies Act provides:

> The following rental units are exempt from this Part:
>
> (f) a rental unit not otherwise exempt from this Act that is provided by an educational institution to a student or member of its staff.

Commissioner McGuinness considered this unit to be one provided by an educational institution to a member of its staff. McMaster University is undoubtedly an educational institution. The tenant admitted that he was a member of its staff. It would therefore seem to follow that the exemption provided for in clause 134(1)(f) is applicable to this case. However, during the

course of the hearing, the tenant argued that this exemption does not apply in all cases where an educational institution rents a unit to a tenant who is a student or a member of its staff, but only where the provision of that unit by the landlord to the tenant is conditional upon the status of the tenant as a student or staff member of the landlord educational institution. In other words, the exemption would apply only in those cases where being a student or staff member is a qualifying condition for the occupancy of the living accommodation. It would not apply in cases where an educational institution makes its accommodation available to the public, and has simply happened to rent one of its units to a student or staff member in a particular case.

In the Commissioner's view, such an interpretation departs from the clear wording of the clause. The exemption is given to "a rental unit ... provided by an educational institution to a ... member of its staff". There is no suggestion in these words that this exemption is available only where eligibility to rent the particular unit is dependent upon the tenant's status as a student or staff member. The Commissioner therefore found that this unit was provided by an educational institution to a member of its staff within the meaning of clause 134(1)(f), and accordingly was exempt from Part XI of the Act, Rent Review.

IN THE MATTER OF: 1310 Pinecrest Road
Ottawa, Ontario

AND IN THE MATTER OF an application for rent review by Riviera Gate Realties Ltd., landlord.

COMMISSISONER: L. C. LeDuc

DATE OF ORDER: June 10, 1983

FILE NUMBER: 126-155-OT

ISSUES: Residential Complexes Financing Costs Restraint Act - Section 2(b)(ii), residential complex purchased more than once.

This was an application under section 126 of the Residential Tenancies Act for review of the rents in the residential complex known as Riviera Gate Apartments. The landlord, Riviera Gate Realties Ltd., was represented by Mr. L. Kelly, its solicitor.

On December 22, 1982, the provincial statute known as the Residential Complexes Financing Costs Restraint Act came into force. This interim law limits the amount of rent increase based on a financial loss stemming from increased financing costs incurred on the purchase of a residential complex.

This Act applies automatically to all applications made to the Commission pursuant to section 126 of the Act after the 31st day of October, 1982. It also applies retroactively where application was made on or before the 31st day of October, 1982, and the following two conditions apply:

> Firstly, the hearing by the Commission pursuant to the application is commenced on or after the day this Act came into force; and,
>
> Secondly, the application is in respect of a residential complex that has been purchased more than once after the 31st day of October, 1979.

The Act defines 'purchase' in the following terms:

> ""Purchase" means the acquisiton of a residential complex by any means whatsoever and includes the acquisition, whether by way of transfer, assignment or otherwise, of an interest, in whole or in part, in an option to purchase or in an agreement to purchase a residential complex."

The landlord's solicitor, Mr. Kelly, argued that the Residential Complexes Financing Costs Restraint Act did not apply in this case. He offered that the one true purchase that had taken place since October 31, 1979, was the sale from Canada Mortgage and Housing Corporation to his client, Riviera Gate Realties Ltd. He conceded that the title to this property was transferred more than once since October 31, 1979. On July 31, 1981, a final Order of Foreclosure granted title to the National Bank of Canada. On October 14, 1981, a second transfer of the property took place when Canada Mortgage and Housing Corporation assumed proprietorship of this property through the National Mortgage Insurance Plan whereby the National Bank of Canada chose to mitigate its damages and transfer the property to Canada Mortgage and Housing Corporation.

Mr. Kelly argued that the Foreclosure Order of 1981 in which the National Bank of Canada was forced to foreclose on its mortgage was not an acquisition, as the mortgagee already held title to the property and was simply preventing the original mortgagor from exercising his right to redeem the mortgage due to its default. In his opinion, the transfer of the property to Canada Mortgage and Housing Corporation from the National Bank of Canada was the evolution of an agreement between the National Bank of Canada and Canada Mortgage and Housing Corporation pursuant to the mortgage insurance scheme and Canada Mortgage and Housing Corporation had no alternative but to accept the property and cover the National Bank of Canada's losses to that date.

He continued by alluding to some of the perceived "pratfalls" which may ensue from a very broad interpretation of this statute. In his argument, he referred to simple transfers from husband to wife where there is no consideration given other than a nominal consideration. He also alluded to the transfer from a Trustee to the beneficiary of a Trust, as well as to the problems arising when a property is passed on through an inheritance and an heir obtains a less than desirable asset. Mr. Kelly argued that it was never the intention of the Legislature that the Act cover such situations.

It was acknowledged by all parties that the transfer of the property from Canada Mortgage and Housing Corporation to Riviera Gate Realties Ltd. was a purchase as defined under section 2 of the Residential Complexes Financing Costs Restraint Act. The point to determine was whether the transfer of title through the foreclosure constituted a "purchase" under this statute.

Commissioner LeDuc concluded that in the case of a foreclosure the transaction that takes place falls within the definition of 'acquisition' as set out in section 2 of the Residential Complexes Financing costs Restraint Act. The mortgagee acquired a valuable asset to do with as it wished. The fact that the mortgagee is an institutional lender with no desire to manage a residential complex was not relevant to this issue. The means used by the mortgagee to obtain the property was a foreclosure. It could have chosen other remedies such as a power of sale. Through its own exertions, the mortgagee acquired the property to protect its investment and to cash in that pledge of security which was given for the loan of money. Commissioner LeDuc accordingly applied the relevant provisions of the Residential Complexes Financing Costs Restraint Act to this application.

Note: The landlord has appealed this Order to an appeal panel of the Commission.